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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 52

JOHN TERRY, ET AL., *Petitionets,*

v.

A. J. ADAMS, ET AL., *Respondents*

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS, A. J. Adams, et al.

To The Honorable Supreme Court of the United States:

A. J. Adams and other respondents herein respectfully submit the following brief:

Jurisdictional Statement

This cause does not present a controversy within the jurisdiction of this court.

Petitioners have not been denied the "right to vote in primaries of a county-wide political party";

1. The Jaybird Democratic Association of Fort Bend County, Texas does not exercise any of the func-

tions of a political party under the election laws of the State of Texas. (Art. 3163, T.R.C.S., R. 111; R. 24-25; Appendix p. 47).

2. The Jaybird Democratic Association does not hold a "primary"; a "primary election" being "an election held by the members of an organized political party for the purpose of nominating the candidates of such party to be voted for at a general or special election, * * * " (Art. 3100 T.R. C.S., Appendix p. 43; R. 24-25, 28-29).

3. There is no recognition by the State nor by any political party of the State of any action by the Jaybird Democratic Association (supra).

No political or civil rights of Petitioners have been denied and no Federal question is presented.

Statutes Involved

References to the Texas Statutes will be by the Article designations during the period pertinent hereto, as distinguished from different designations in the 1951 Texas Election Code covering the subject matter.

Article 3163 T.R.C.S. is relied on by Petitioners, but for a clear understanding additional Texas Statutes are printed in full in the Appendix hereto, p. 47.

Statement of the Case

This action presents matters of first impression.

Neither the Supreme Court of the United States nor a Court of Appeals has earlier passed upon a factual situation, nor the legal questions, as here involved.

The right of the Negro to vote in General Elections and in Primary Elections conducted under the law, has been decided. Such questions are not in this case. Nor do we have involved any question of long-established Primary Election machinery being repealed, amended or "juggled" for the purpose of avoiding a statute or new court decision.

The Statement of the Case by Petitioners is susceptible of misconstruction with consequent misunderstanding of asserted facts, or legal results therefrom, variant from the record; and Respondents therefore make this Statement.

Due to conditions during and following the Reconstruction Period (R. 38-39), the Jaybird Democratic Association of Fort Bend County, Texas was organized in 1889 with the stated object:

> "The object of this Association shall be to secure to the people of Fort Bend County economic and honest county government and the election of honest and faithful county officials",

and its membership was and is limited to bona fide white citizens of the county (R. 24, 27, 38-40) whether they be Democrats, Republicans or white members of other political parties (R. 74); and there is no connection between the Jaybird Democratic Association and the Democratic Party in the State of Texas (R. 74).

The occasion for white membership only is quoted by the Court of Appeals from the testimony of Judge D. R. Pearson, an original member of the Association:

> "One of the major occasions for limiting the membership of the Association to white people was that the negro vote had been controlled by—I will call them bad white people * * * and thought that by combining the white people and keeping the bad white people separated from the darkies who were easily led, that

we could obtain good government and the exclusion of the negro was merely an accident (incident) of our purpose. The Association was not formed, was not directed against the negro, it was directed against the bad white men who were leading astray the darkies. * * * As a matter of fact, prior to 1950, none of our negro friends ever asked to be admitted to membership in the Democratic Jaybird Association." (R. 113, 69-70).

That the object of the Association has been accomplished is demonstrated by the testimony of Judge D. R. Peareson:

"Q. Judge Peareson, there have been some questions directed toward the success of the good folks that the Jaybird Democratic Association has endorsed and who have thereafter been nominated in the July Democratic primary and thereafter elected in the general election. What has been the experience of the Jaybird Association in its effort to endorse good folks for office?

A. Why they have always sought to endorse capable and honest officials. And there is only one instance since the Association has been formed where its endorsee proved false to his trust. That is one man who was selected and endorsed by the Association and elected who did some acts that were not in accordance with the law.

Q. Other than that one instance, Judge, where a Jaybird Association endorsee was thereafter nominated in the July primary and elected in the November general election, has any other person so endorsed by the Association ever failed to give good, honest and efficient acquittance of his office?

A. I think not. I think the administration of affairs has been very well conducted all the way through with that single exception.

Q. Have we ever had, Judge, to your knowledge, any complaint from any of our colored friends about the administration or the performance of the duties

of any elected official in Fort Bend County who had been earlier endorsed by the Association?
A. Not prior to January 1, 1950." (R. 81).

Virtually all of the pertinent facts are covered by the Stipulation (R. 23-38) and the Qualified Stipulation (R. 38-40), and the general coverage of the main items therein is:

The Jaybird Democratic Association "primaries" are held in May and June; and the Statutory Primary Election is held by the Democratic Party on the fourth Saturday in July and the fourth Saturday in August as required by Article 3102 TEXAS R.C.S. (R. 23-24).

There is no "Jaybird Party" in Fort Bend County, Texas, but at all times since 1889 the "Jaybird Democratic Association of Fort Bend County, Texas" has existed (R. 24) and has an Executive Committee representing each of the twenty-two voting precincts of the Association (R. 25).

The Executive Committee handles all the details of the Association Primaries, including determining eligibility of applicants, dates of primaries, fees to be paid, preparation of ballot (R. 25-26); canvasses the returns from the twenty-two voting precincts and announces the endorsees of the Association, but *no results of the voting are certified by or to any person, committee or official* (R. 28).

Membership in the Association is limited to white males and females who endorse the principles of the Association and who are eligible to vote (R. 27-28); and a rule of the Association prohibits the endorsement of a member for any office which he has held for two terms, and the application of any such member for a position on the Jaybird Association ballot is rejected (R. 26).

Membership in a political party does not disqualify a person from membership in the Jaybird Democratic Asso-

ciation nor does membership in the Association disqualify a person from membership in any political party (R. 29-30).

Members of the Negro race are not admitted to membership in the Association under its rules of membership and petitioners would be denied a ballot and a vote if they presented themselves, since to permit them to vote would be contrary to the present policy, rules and regulations of the Association (R. 27-28).

The Jaybird Democratic Association does not do any of the things provided by Art. 3163 to be done by a political party acting thereunder (R. 24-25).

There is no compulsion upon any person receiving endorsement of the Association to run for office. *Any qualified applicant* for a position on a Democratic Party ballot for a July primary of such party *must himself comply* with the laws prerequisite to securing a place on said ballot *whether he is or is not an endorsee of the Jaybird Democratic Association;* and every qualified applicant who does comply with the law is placed on the Democratic Party Primary ballot whether or not endorsed by the Association (R. 28-29).

No member of the Negro race nor any other qualified person has been refused a place on the Democratic Party Primary ballot nor a right to vote in the Democratic Party statutory Primary (R. 29). Since 1938 the persons winning the endorsement of the Jaybird Democratic Association at its Primaries have generally applied for positions on the Democratic ballot in the statutory July Primary; have usually been nominated thereat and elected at the general election (R. 30); but in various instances the Jaybird Democratic Association has not endorsed any person for various offices, and in various instances the endorsees of the Jaybird Democratic Association have been defeated in the Democratic Party July Primary (R. 31-37).

Petitioners are qualified voters in Fort Bend County, Texas (R. 37); have never applied for a position on the July Democratic Party Primary ballot nor sought such filing by or on behalf of any other person. Petitioners are not members of any local political organization but three thereof are members of the National Association for the Advancement of Colored People (R. 37).

At this point we feel constrained to clarify certain statements in Petitioner's statement of the case:

The witness, Judge Peareson, did inadvertently repeat the phrase "Jaybird Party" from the question asked, in correcting the word "Nominee" as therein used, to "endorsee" (R. 78).

The witness, Adams, had not heard of people referring to the Association as the "Jaybird Party" (R. 59); nor had the witness, Darst (R. 63).

The trial court did state that the Association is generally known as the Jaybird Party (R. 89), but without basis in the record other than in Petitioners' pleading, contrary to the stipulation (R. 24) and not upheld by the Court of Appeals.

The Record reference (p. 30) that the Association has "nominated" for offices, shows it only "indorsed" and the official statutory Democratic Party primary "nominated".

The Association does endorse good men to get them elected to office (R. 46, 64); but after the results of the Association balloting are announced, neither the Association nor its Executive Committee further participates in securing the election of the endorsees, but its activities cease (R. 28-29, 40, 56, 73-74) and all members are free to vote their convictions in the subsequent statutory Democratic Primary (R. 58, 74).

Petitioners convey an erroneous impression by their statements that since 1889 the "nominees of this party" have been the only names on the Democratic Primary and General Election Ballots and have been elected to County offices (Brief, p. 4). The stipulation (R. 23-38) affirmatively does not cover matters prior to 1938 (R. 31); shows numerous instances in which endorsement by the Association was not sought; others in which Association indorsees were defeated in the Democratic Primary and others in which persons whose applications for endorsement were rejected, were nevertheless nominated in the Democratic Primary and elected (R. 30-37); and another in which the Association indorsee defeated a prior Association-indorsed incumbent who had served two terms as County Judge (R. 79).

Campaign cards, etc., showed candidates as "subject to the action of the Jaybird primaries in May and the Democratic primaries in July"; and any candidate defeated in the Jaybird primary "can keep right on running" (R. 49-50).

The brief quotations in Petitioners brief purporting to show purposeful holding of May voting to exclude negroes, are not fairly representative; the Association primarily desires to determine what good men it should endorse, the Negroes are permitted to vote in the statutory July primary and their exclusion from the May Jaybird Association voting is merely incidental and not the main purpose (R. 60, 63-64, 77, 79).

Any person can take the statutory steps to place himself or others on the ballot in the official statutory July primary election, or can "write-in" the person for whom he desires to vote (R. 78-79, 29, 80), and no qualified person has ever been refused a place on such July primary ballot (R. 80).

The Jaybird "primaries" are held in May and June and the official statutory Democratic primary party elections are held in July and August (R. 23-24) and the Association voting has never been held on the same day as the Democratic party primaries (R. 46-47).

The Court of Appeals points out the cause of error by the District Judge with reference to the facts, with the statement that the undertaking to abstract the stipulation of facts offered by Plaintiff, is done

> "* * * with undue meagerness and with the result of not making clear what the real facts as stipulated are * * *"

and * * * "because the facts are undisputed, and because the question at issue is one not of fact but of law," * * * quotes controlling facts from the stipulation as to what the Association does and does not do, and summarizes other controlling facts (R. 107-109), including:

> "Said Association, however, has not since 1938, and it does not: (a) Have a State organization; (b) Follow or attempt to comply with any of the provisions of Article 3163 of the Revised Statutes of Texas, or of any other statutes of the State of Texas with reference to primary elections or general elections; (c) Hold any convention or 'primary election' on the legal primary election day, to-wit: The fourth Saturday in July or the fourth Saturday in August, of any year; (d) Hold any primary convention in any precinct on the Saturday preceding a legal primary election day; (e) By the chairman of a county committee, or otherwise, certify to the County Clerk of Fort Bend County,

Texas, or to the County Judge thereof, or to any official committee or other representative of the Democratic or Republican party, any nominations or indorsements made by the Association; (f) Have, or cause to be, printed in a separate column headed by the Association name any nominations of any official ballot used, or for use in, a primary or general election held on a legal primary election day or general election day; (nor does the name, Jaybird Democratic Association of Fort Bend County, Texas, or any part of indication thereof, appear on any ballot in any election other than the primaries, or other special voting occasions, held by the Association itself and alone); (g) Make, or cause to be made, a written application to the County Judge for such printing, signed and sworn to by 3 percent of the entire vote cast in Fort Bend County at the last preceding general election."

* * *

"The ballots from each voting precinct are canvassed by the Executive Committee which declares the results of such canvass and announces the identity of the persons who have received the indorsement. No officer nor committee of such association certified the result of the vote or any nominations of the association to the County Clerk of Fort Bend County, to the Democratic County Executive Committee, nor to the committee or official of any party of a statewide organization.

"No person who receives the indorsement of the Jaybird Association is compelled to run in the Democratic primary, but if he wishes to run he may do so. But he must himself file his application with the Executive chairman or committee of the Democratic party, must independently comply with the requirements of the Democratic party or the law, and must himself pay the fee as provided by law. Neither the Jaybird Association nor anybody for it applies to the Democratic

party for the placing of its nominee on the ballot for the Democratic party election."

In reversing the District Court, the Court of Appeals olds:

"Here, as a comparison, point by point, of the provisions of Article 3163, with the stipulated facts set out in note 3, supra, will show, *the Jaybird Democratic Association does not in any way or manner operate as a part or parcel of, or in liaison with, state political or elective machinery.* In short, *it is not a part of the two step arrangement, the Democratic primary and the general election, so as to make its action state action.*"

* * *

"What and all that is for decision here is *whether the complained of action is action under color of state law,* depriving plaintiffs of rights accorded them by the invoked constitutional and statutory provisions. To answer that question in the affirmative and to hold that it is, would be, we think, to go directly contrary to the long line of cases beginning with the Civil Rights cases, 109 U.S. 3, and ending with Collins v. Hardyman, supra. In that case it was said:

> "While we have not been in agreement as to the interpretation and application of some of the post-Civil War legislation, the Court recently unanimously declared, through the Chief Justice:
>
> "'Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the (fol. 160) *action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.* That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.'"

Denial of Errors Urged By Petitioners

1.

The Court of Appeals correctly held that the Constitutional prohibition against abridgment or deprivation of civil rights applies to only State action.

2.

The Court of Appeals correctly held that the Jaybird Democratic Association does not operate as a part or parcel of, or in liaison with, State political or elective machinery and that its action is not State action.

3.

The Court of Appeals correctly held that the rule of SMITH v. ALLWRIGHT, 321 U.S. 649, 64 S. Ct. 757, and the decisions in RICE v. ELMORE, 65 Fed. 2d 387, and BASKIN v. BROWN, 174 Fed. 2d 387, are not applicable to this cause.

Summary of the Argument

A careful review of the applicable Constitutional and Statutory provisions and of Court decisions cited by both parties, with a proper analysis of the facts and basic legal principles actually involved, conclusively demonstrates that the prohibition against discrimination and denial of rights is directed to the United States and the States themselves, their agencies and organizations or individuals performing functions of and for the State. Private organizations and individuals, not agencies of the State nor performing functions thereof or therefor, are not subject to such prohibitions.

While each overlaps, the argument may be summarized under the following points:

1. The State of Texas, by statutes, has expressly prescribed procedures and machinery regulating Primary and General Elections; and acts of groups or individuals not in compliance therewith are void and of no effect. (Extended in Argument Par. 1 hereof, controverting Petitioner's Arg. Pars. II and III.)

2. The Jaybird Democratic Association is not a political party subject to or controlled by Article 3163, TEXAS REVISED CIVIL STATUTES. (Extended in Argument Par. 2 hereof, controverting Petitioner's Arg. Pars. II and III.)

3. The Jaybird Democratic Association has never operated under any provision of the law, has never accepted any benefits from, nor yielded any inherent power to, the State, but has always conducted its affairs independently of, and without regard to, or encroachment upon, or in conflict with, the provisions of the Texas Election Laws. No binding nor legally enforceable result comes from its "Primaries"; no person acquires any rights nor official recognition by reason of participation therein, nor is any person deprived of any legal right by being denied participation therein. Its balloting is therefore merely a straw vote and of no legal consequences; and its "Primaries" are in no way recognized, adopted nor acquiesced in by the State of Texas nor any subdivision nor agency thereof. (Extended in Argument Par. 3 hereof, controverting Petitioner's Arg. Pars. I, II and III.)

4. The Jaybird Democratic Association was organized in 1889 in the sole interest of economic and honest county government and the election of honest and faithful county officials. The Texas Primary Election Law was first passed in 1905. The Jaybird Association elected to not accept the permissive procedures of Article 3163, and to not become a part of, nor participate in, the State electoral machinery; and its decision, unchanged in the forty-five years prior to

this suit, cannot be considered a "device" to violate the law nor circumvent the Constitution, nor to preclude negroes from voting in any official Primary or effective election. (Extended in Argument Par. 4 hereof, controverting Petitioner's Arg. Pars. I and IV.)

5. The Jaybird Democratic Association is not an agency of the State in determining the participants in its Primaries; does not determine the participants in a State Primary election, nor engraft its procedure or purpose upon the State-prescribed election process or machinery; and does not, under State statute or color of the law, assume nor exercise any political function. The rule applied in SMITH v. ALLWRIGHT (321 U.S. 649, 64 S. Ct. 757) does not apply to the case now before the Court. (Extended in Argument Par. 5 hereof, controverting Petitioner's Arg. Pars. IV, V and VI.)

6. The Jaybird Democratic Association does not deny to Petitioners, nor in any way abridge, any right to which they are entitled nor which is guaranteed to them under the Constitution and laws of the United States. (Extended in Argument Par. 6 hereof, controverting Petitioner's Arg. Par. IV.)

7. The right to vote, protected by the Federal Constitution and Statutes, is the right to vote in an official political election. These provisions do not cover voting in private organizations—fraternal, religious, labor, social, or even organizations political in character not exercising functions of the State nor participating in State electoral processes. The contention in this case is that a Negro, by virtue of his color, has the right to vote wherever, whenever and within whatever organization voting may be conducted. Petitioners, not being members of the association, and the balloting of the members not being official nor legally effec-

tive, have been deprived of no right, and have no right to maintain this suit. (Extended in Argument Par. 7 hereof, controverting Petitioner's Arg. Par. IV.)

Argument and Authorities

1.

(Controverting Petitioner's Argument Paragraphs II and III.)

This case presents no issue concerning General Elections. Similarly no issue is presented concerning Primary Elections conducted under, or in accordance with, the Primary Election Laws of Texas.

The Texas Statute urged by Petitioners as controlling is Article 3163, quoted in Appendix P hereof (now known as TEXAS ELECTION CODE, Article 13.54).

For clarity, the Texas Primary Election laws are divided into several sections in Chapter 13, Title 50, REVISED CIVIL STATUTES OF TEXAS, and provide for NOMINATIONS:

> "1. By parties of one hundred thousand votes and over" amended in 1945 to two hundred thousand votes)—Art. 3100 to 3153 Texas R. C. S.
>
> "2. By parties of ten thousand and less than one hundred thousand votes"—Art. 3154 to 3158 (amended in 1945 to less than two hundred thousand votes).
>
> "3. Non-partisan and independent candidates." Art. 3159 to 3162.
>
> "4. By parties without State organizations." Art. 3163,

and it is only by reference in particular statutes, that the provisions of other grouped articles are applicable thereto.

Art. 3100 TEXAS REVISED CIVIL STATUTES, defines "Primary elections" as "*an election* held by the members of an

organized political party *for the purpose of nominating the candidates of such party to be voted for at a general or special election,* or to nominate the county executive officers of a party."

The Jaybird Democratic Association voting is therefore not a "Primary Election", since the association *does not nominate candidates* of the association nor candidates *to be voted for at a general or special election,* nor county executive officers of a party.

Article 3101 (as amended in 1945) provides candidates for State offices, candidates for Congress and district offices in districts comprising more than one county who are to be nominated by each organized political party casting over two hundred thousand votes " * * * shall, together with *all candidates for office* to be filled by the voters of a county, or of a portion of a county, *be nominated in primary elections* by the qualified voters of such party."

Art. 3102 provides that the *fourth Saturday in July "shall be general primary election day, and primary elections* to nominate candidates for a general election *shall be held on no other day,* except when specially authorized."

The above provisions contain the mandatory "shall". Thus, any person desiring to be nominated for an office to be filled by the voters of any county or portion thereof *must be nominated* in a *legal primary election* which may be *held only on the fourth Saturday in July.*

Art. 3154 grants permission to political parties casting more than ten thousand and less than two hundred thousand votes to nominate candidates "under the provisions of this law by primary elections", * * * which are held on the primary election day.

Non-partisan or independent candidates may have their names printed on the official ballot by complying with Articles 3159-3162.

Art. 3163 (quoted in full in an appendix hereto) is with specific reference to only a "*political party* without a state organization *desiring to nominate candidates* for county and precinct offices only * * * ," and by its express wording that such a party " * * * *may nominate* such candidates therefor under the provisions of this Title" * * * is merely a *permissive* statute granting authority to local political parties which, in the absence of the statute, cannot nominate candidates, and which can nominate candidates only upon condition that they be nominated in the prescribed manner.

The purpose of a nomination is to provide a vehicle by which the nominee becomes entitled to have his name placed on the "official ballot" in a general election, as Art. 2978 TEX. R. C. S. provides:

> " * * * no name shall appear on the official ballot except that of a candidate who was *actually nominated* (either as a party nominee or as a nonpartisan or independent candidate), *in accordance with the provisions of this Title.* * * * "

These Statutes are strictly construed and acts not in compliance therewith have no effect but are void, for example:

BOUNDS v. MCCALLUM, Texas Comm. of Appeals, 52 S.W. 2d 1047 (1932), holding that since a party operating under Article 3163 is limited to county and precinct officers, its candidates for district offices, nominated at a regular primary on the statutory primary election day, were *not "nominated under statutory authority"*, and they were *therefore ineligible* to appear on the official general election ballot and were excluded therefrom on the suit of Democratic Party nominees.

PULLIAM v. TRAWALTER, Tex. Civ. App., 120 S.W. 2d 108, (1938), holding that since the Republican Party did

not assemble *in the manner* and *at the time required by law* for its convention, its nominee for Sheriff was *not "chosen in accordance with the law* as a nominee of any party" *and was excluded* from the ballot on the suit of the Democratic Party nominee.

STATE v. NORRISS, Tex. Civ. App., 33 S.W. 2d 850 (1930), holding that the primary election statutes

> "only *required* such nomination to be determined by a primary election when the candidates were those of an organized political party that cast one hundred thousand or more votes at the last preceding general election."

and that therefore the "White Man's Union Association" operating under Article 3163 was *not required* to hold a primary election and therefore the Corrupt Practices Act was not applicable to it.

Under the specific wording of the statutes and under the holdings in the above cases, any political party which does desire to nominate candidates for county and precinct offices only, as provided in Article 3163, must comply with each of the provisions of said statute; otherwise such acts as it does perform are futile.

Persons participating in such a futile act obtain no benefit thereby; and persons not participating therein are deprived of no right and suffer no detriment therefrom.

2-3.

(Controverting Petitioner's Argument Paragraphs I, II and III.)

Article 3163 provides:

> "Any *political party* without a state organization *desiring to nominate candidates* for county and precinct

offices only *may nominate* such candidates therefor *under the provisions of this Title* by primary elections or by a county convention *held on the legal primary election day,* * * * "

and specifies the procedure.

The time schedule of the Jaybird pre-primary balloting and the dates thereof in 1950 were:

First Preference Election	May 6, 1950
Run-off Preference Election	June 3, 1950

The time schedule of Texas elections is statutory and the dates of elections in 1950 were:

Date of request for a candidate for nomination for a place on the ballot in general primary (Art. 3113)	June 17, 1950
General primary election date (Art. 3102)	July 22, 1950
Run-off primary (Art. 3102)	Aug. 26, 1950
General election	Nov. 7, 1950

The Jaybird Association balloting is not an "election by the people", has no recognition, validity nor effect under the law, and persons endorsed or "nominated" acquire no rights nor official recognition by reason thereof.

The following analysis under Art. 3163 conclusively demonstrates that the activities of the Jaybird Democratic Association in no way attempt to accept the permission granted by Art. 3163 nor to follow nor coincide with any

law, but, to the contrary, demonstrates that the balloting by the Jaybird Association membership is merely an independent "straw vote" and an expression of opinion and preference as between persons who are contemplating subsequently applying for a position on the ballot for the statutory Democratic primary in July.

Provisions of Art. 3163	*Actions of Jaybird Association*
1. "Any political party without a State organization * * * *"	1. The Jaybird Association is without a State organization and is not affiliated with any State organization; but is not a political party.
2. "* * * * desiring to nominate candidates for county and precinct offices only * * * *"	2. The Jaybird Association has never desired to nominate, and has never nominated such candidates; and the most that can be said of the balloting of its members is that the Association determines thereby the preferences of the members as between persons who are contemplating applying for positions on the ballot for the statutory July Democratic Party primary.
3. "* * * * may nominate such candidates therefor under the provisions of this title * * * *"	3. The Jaybird Association has not accepted the permission extended by the statute and does no act or thing under the provisions of the Title "Elections" of the Texas statutes.

4. " * * * by primary election or by a county convention held on legal primary election day * * * "

4. The Jaybird Association holds no election or balloting of any kind on the legal primary election day; and does not hold a county convention on such day, or otherwise, and does not elect delegates to such a convention at any time.

"Primary election" is defined in Art. 3100 Texas R. C. S. as an election by members of an organized political party who nominate the candidates of such party "to be voted for at a general or special election * * * ". The Jaybird Association does not nominate any candidates to be voted on at any election.

5. " * * * all nominations made by any such parties shall be certified to the county clerk by the chairman of the county committee of such party * * * "

5. No nominations are made by the Jaybird Association; no preference expressions by its members are certified to the county clerk or any other official or committee of any party or governmental subdivision.

6. " * * * parties so certified shall be printed on the official ballot in a special column headed by the name of the party; * * * "

6. No nominations and no preferences of the Jaybird Association members are printed on any official ballot, and neither the name of the Jaybird Democratic Association of Fort Bend County, Texas, nor any part thereof appears, nor has it ever ap-

peared, on any ballot at the statutory July primary or subsequent general election.

7. * * * provided, a written application for such printing shall have been made to the county judge, signed and sworn to by three per-cent of the entire vote cast in said county at the general election."

7. No written application is made by or on behalf of the Jaybird Association nor by nor on behalf of any nominee or endorsee as such of the Association or of its members; in the event the person, or persons, "endorsed" or for whom preference is expressed by the Jaybird Association membership in their May or June balloting, desires a place on the statutory July ballot, it is entirely up to such person to comply with the laws applicable to all persons who desire their names placed on such ballot. The Jaybird endorsement has no connection with such person's application for a ballot position.

The Jaybird Association has never participated in a General Election, nor has its name ever appeared on a ballot therein.

As held herein by the Court of Appeals:

"Here, as a comparison, point by point, of the provisions of Article 3165, with the stipulated facts set out in note 3, supra (R. 107-109), will show, the Jaybird Democratic Association does not in any way or manner operate as a part or parcel of, or in liaison with,

state political or elective machinery. In short, it is not a part of the two step arrangement, the Democratic primary and the general election, so as to make its action state action." (R. 111)

The Jaybird Democratic Association has never appeared, nor applied for printing its name, on the official ballot in any General Election; nor has any of its endorsees applied for a place on the official ballot in a special column headed by the name of the party. If the Association is a political party, its preference winners are complete outcasts so far as the election machine and the election laws of the State of Texas are concerned.

Assuming, for the point, that the Jaybird Democratic Association desired to accept the permission granted in Article 3163, still the Association does none of the things requisite under Article 3163. It therefore has no right to enter its party name nor the name of its endorsees on the statutory General Election ballot, and neither it nor its endorsees are entitled to, nor have, any recognition under the law.

As quoted by Petitioners from WAPLES v. MARRAST, 108 Tex. 5, 184 S.W. 180,

> "A political party is nothing more or less than a body of men associated for the purpose of furnishing and maintaining the prevalence of certain *political principles* or beliefs *in the public policies* of the government. As rivals for popular favor they strive at the *general elections* for the control of the agencies of the government as means of providing a course for the government in accord with their political principles and the administration of those agencies by their own adherents. * * * "

Such an organization and the designation "political party" contemplates difference in views on tariffs, taxes, foreign

relations and innumerable other items—as distinguished from the sole purpose and object of the Jaybird Association:

> "To secure to the people of Fort Bend County economic and honest county government and the election of honest and faithful county officials."

The desire and effort to secure economic and honest government and the election of honest and faithful officials should be axiomatic in all individuals and organizations as well as in political parties, and certainly does not constitute such a political principle or belief in public policies as to characterize the Jaybird Association a political party within the meaning of the statute.

The Jaybird Democratic Association has never acted under any law, has at all times conducted its own affairs on a strictly unofficial and independent local level, accepting nothing from the State and asking nothing except its Constitutional rights to manage its own affairs without outside interference.

4.

(Controverting Petitioner's Argument Paragraphs I and IV.)

To assert, as do Petitioners, that the Jaybird Association balloting is a "device" to circumvent the Constitution and to deny Negroes an effective voice in elections, is without basis in history, fact and law.

To say that the Jaybird Association balloting is the only contest that really counts and that the Association puts its "nominees" on the ballot in the official statutory Democratic Party Primaries and in the General Election without opposition is contrary to the true facts, including those stipulated by the parties.

The Jaybird Democratic Association was organized in 1889 in an effort to secure honest and efficient local government which had been destroyed during Reconstruction. There were then no Primary Elections and the status of the Association was strictly a civic organization of honest, upright citizens advocating honesty in government and of officials.

When the Texas Primary Law was passed in 1905, the status of the Jaybird Democratic Association remained unchanged. The Association did not desire to participate in politics, and did not accept the authorization of Article 3163 to become a political party nor to nominate and put candidates on the General Election ballot. It did, however, continue its interest in honest government by providing an informal method by which its members could express their preference between potential candidates, who themselves might or not later apply for a position on the official Primary Election ballot.

This method of endorsement of a potential candidate is no more effective than approvals of candidacy by churches, labor unions, or newspaper advertisements or editorials. It is not, and never has been, a substitute for any part or portion of the election machinery of the State; it does not circumvent the Constitution or laws, but is merely a straw vote without reference thereto, and cannot in any way infringe upon the rights of qualified voters nor candidates for office in a Primary or General election.

The Jaybird Association balloting counts for nothing, predetermines nothing and controls nothing.

While the record (pp. 30-36) gives several examples affirmatively contradicting Petitioners, we here mention only the specific example of I. G. Wirtz, Sr., who was County Commissioner for many years without the endorsement of the Jaybird Association, and of I. G. Wirtz, Jr., who was

the endorsee of the Jaybird Association in 1940 and 1942, was rejected by the Association (under its two-term limitation rule) thereafter, but who nevertheless won in the official Democratic Primary and in the General Election in 1944, 1946 and 1948.

Petitioners' assertion that the Jaybird Association is, in fact, the local Democratic Party and that the latter has for sixty years submitted to the decisions and desires of the Association, which is therefore merely a "device", is contradicted by the record and perhaps results from confusing the present case with PERRY v. CYPHERS, 186 Fed. 2d 608.

In PERRY v. CYPHERS, supra, the Democratic Party Primary ballot did not include the names of any candidate for any county or precinct office. The Citizens Party (strictly a white man's party) held its Primary Election under Article 3163 on the same official Primary Election day and across the street from the Democratic Party voting place, and limited its ballot to county and precinct offices.

Thus there were two separate official Primary Elections with no duplication of offices nor candidates, and in only one of which were negroes permitted to vote, with the result that they were denied a ballot on which to vote for local officers at the Official Statutory Primary Election, and were thus deprived of participation in the First step of the "Two-Step" Statutory Election machinery.

The Jaybird Primary is held two months before the first of the two steps in Fort Bend County; a complete ballot (with additional write-in privileges under the Texas law) is used in the Statutory Primary and General Elections in Fort Bend County, and no one is denied the Official Election ballot.

As held in this cause by the Court of Appeals, the Jaybird Democratic Association is entirely separate and apart from Article 3163 and

> " * * * does not in any way or manner operate as a part or parcel of, or in liaison with, State political or elective machinery. In short, it is not a part of the two-step arrangement, the Democratic Primary and the General Election, so as to make its action State action." (R. 111)

The Jaybird Association has violated no statute, nor been guilty of illegal conduct, as urged by petitioners.

It simply has never accepted the benefits of, nor so acted as to be subject to, any election statute. It has done no act nor performed any function in connection with the State Election machinery.

5.

(Controverting Petitioner's Argument Paragraphs IV, V and VI.)

In each of the decisions with reference to the exclusion of Negroes from voting, and as stated in SMITH v. ALLWRIGHT, 321 U.S. 629, 88 Law. Ed. 701, 151 A.L.R. 1110,

> "The question as to *whether the exclusionary action* of the party *was the action of the state persists as the determinative factor.*"

and as stated by the Court of Appeals herein:

> "What and all that is for decision here is *whether the complained of action is action under color of state law*, depriving plaintiffs of rights accorded them by the invoked constitutional and statutory provisions." (R. 113)

For the convenience of Court, we quote pertinent verbiage from the 14th and 15th Amendments to the UNITED STATES CONSTITUTION:

"* * * *No State shall make or enforce any law* which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State* * * * *deny* to any person within its jurisdiction the equal protection of the laws." (14th Amendment)

"The right of citizens of the United States to vote *shall not be denied or abridged* by the United States or *by any State* on account of race, color or previous condition of servitude." (15th Amendment)

and from the Elective Franchise Statute, 8 U.S.C.A., Sec. 31, on which Petitioners largely rely:

"All citizens of the United States who are otherwise qualified by law to vote *at any election by the people* in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; *any constitution, law, custom, usage, or regulation of any State* or Territory, or by or under its authority, to the contrary notwithstanding."

As quoted by the Court of Appeals (R. 113-114) from COLLINS v. HARDYMAN, 341 U.S. 651,

"Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 (1883), the *principle* has become firmly embedded in our constitutional law that the (fol. 160) *action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.* That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

The case most closely analogous to the present Jaybird Association case is DRAKE v. EXECUTIVE COMMITTEE OF DEMOCRATIC PARTY FOR CITY OF HOUSTON (Dist. Ct. So. Dist. of Texas, Houston Div.), 2 Fed. Sup. 486 (January 1933), wherein the right of a Negro to vote in a City of Houston Democratic Party Primary was involved, and where it was held:

> "* * * *in the absence of a controlling statute* of the state, *a political party in Texas*, acting through its convention, committee, or otherwise under party rules and regulations, *has inherent power* to prescribe the qualifications of its members. * * * and that the *action of defendant*, city executive committee *(acting not under powers derived from the state, and not as an agency of the state*, but presumably in accordance with rules and regulations of the Democratic Party), in so denying plaintiff the right to vote in such primary election, *does not violate Plaintiff's rights* under the Fourteenth Amendment."

Each decision which on casual reading may seem adverse to Respondents has involved:

(1) The right of the Negro to vote in Official Statute-prescribed Primary Elections of the Democratic Party, such as NIXON v. HERNDON, NIXON v. CONDON, and SMITH v. ALLWRIGHT (infra); or

(2) The deprivation of the right of the Negro to vote in a Democratic Party primary where the primary election statutes have been repealed for the express purpose of eliminating the primary (but where the same two-step election procedure in fact continued) after the decision of the United States Supreme Court in SMITH v. ALLWRIGHT, such as the RICE v. ELMORE and BROWN v. BASKIN opinions by the Fourth Circuit (infra); or

(3) An instance where the Negro was permitted to vote in the Official Statute-prescribed Primary Election, but whose vote was thrown out and not counted by the election officials who under the Louisiana statute were agents of the state, as in the criminal case, UNITED STATES v. CLASSIC (infra); or

(4) A Local Party Statutory Primary election which actually constituted a part of the complete Official Primary election, as in PERRY v. CYPHERS (supra).

A clearer concept of the fundamental principles there and here involved and the inapplicability of the authorities relied upon by petitioners can best be demonstrated by a chronological review of earlier decisions, even at the risk of unduly lengthening this brief.

NIXON v. HERNDON, 273 U.S. 536, 71 Law Ed. 759 (1926), involved a 1923 Texas Statute providing that

> " * * * in no event shall a negro be eligible to participate in a Democratic Party Primary Election held in the State of Texas * * * ".

This Honorable Court held that the State of Texas itself thereby discriminated against the negro.

NIXON v. CONDON, 286 U.S. 73, 76 Law Ed. 948 (1931), arose after the 1927 repeal of the 1923 Texas Statute and the passage of a new act providing:

> "Every political party in this state through its state executive committee shall have the power to prescribe the qualifications of its own members, and shall in its own way, determine who shall be qualified to vote or otherwise participate in such political party * * * ". (Art. 3107, Appendix p. 45).

The Democratic Party is by statute required to hold a Primary and the State Democratic Executive Committee, accepting the statutory grant of power, adopted a resolution " * * * that all white Democrats * * * and none others, be allowed to participate in the Primary Elections * * * ".

This Honorable Court pointed out that the Executive Committee has no powers inherent in its being, that the State Convention (which chooses the Committee) has never declared a will to bar negroes from admission to the party, and that

> "Whatever power of exclusion has been exercised by the numbers of the Committee has come to them, therefore, not as the delegates of society, but as the delegates of the State."

The Court then points out that such Executive Committee resolution would continue binding on Election Judges although the party in convention may have sought to override it, and that

> "Power so entrenched is statutory, not inherent. If the State had not conferred it, there would be hardly color of right to give a basis for its exercise".
>
> * * *
>
> "The pith of the matter is simply this, that when those agencies are invested with an authority *independent of the will of the association* in whose name they undertake to speak, *they become to that extent the organs of the State itself*, the repositories of official power. *They are then the Governmental instruments* whereby parties are organized and regulated to the end that government itself may be established or continued. * * *
>
> "*Delegates of the State's power* have discharged their official functions in such a way as to discriminate invidiously between white citizens and black".

Thus the action of the State through its agent the Executive Committee was condemned.

In 1932 (on the authority of Article 3107 quoted in the Appendix hereto) the Convention of the Democratic Party in Texas passed a resolution:

> "Be it resolved that all white citizens of the state, who are qualified to vote under the Constitution and Laws of Texas shall be eligible for membership in the party and subject for participation in the primary."

and the State Executive Committee and the County Executive Committee each declared the resolution valid to deprive Negroes a vote in the Statutory election.

WHITE v. COUNTY DEMOCRATIC EXECUTIVE COMMITTEE OF HARRIS COUNTY, Dist. Ct. So. Dist. of Texas, Houston Div., 60 Fed. 2d 973 (1932), involved said 1932 resolutions, which were based on Article 3107 of the TEXAS STATUTES (quoted in Appendix hereto), and the Court there held that "*The convention itself is a creation of a statute* * * * " and pointed out that

> "For a period of more than twenty-five years, the Democratic Party in Texas has, from time to time, *accepted grants of power from the state, surrendered its own inherent powers,* * * * "

and that

> " * * * the Democratic Party in Texas *has*, over a period of twenty-five years, *chosen to be known as a child and agency of the State of Texas, abandoning its own inherent powers, and choosing to conduct its affairs under grants of power from the state.*"

The WHITE case was in effect reversed by the GROVEY case next mentioned and is incorporated here only to illustrate the position of the Democratic Party as diametrically opposite from that of the Jaybird Association.

A political party itself and the convention thereof was affirmatively recognized as having inherent powers (as distinguished from State delegation and agency powers) in the next case reaching the Supreme Court.

GROVEY v. TOWNSEND, 295 U.S. 45, 79 Law Ed. 1292 (1935), the next decision by the Supreme Court, involved the same 1932 Convention and Executive Committee resolutions as in the WHITE case.

Differentiating the NIXON case (supra) and the dictates of the State of Texas, through the Democratic Executive Committee as its agent, from the resolution of the Party Convention itself which "upon its face is not state action", the Supreme Court, by unanimous opinion in 1934, held:

> "The Supreme Court of the state has decided, in a case definitely involving the point, that the Legislature of Texas has not essayed to interfere, and indeed may not interefere, with the *constitutional liberty of citizens to organize a party and to determine the qualifications of its members* * * *,
>
> * * *
>
> "We are not prepared to hold that in Texas the *state convention* of a party has become a mere instrumentality or agency for expressing the voice or will of the state * * *,
>
> * * *
>
> "We find no ground for holding that the respondent has in obedience to the mandate of the law of Texas discriminated against the petitioner or denied him any right guaranteed by the Fourteenth and Fifteenth Amendments."

UNITED STATES v. CLASSIC, 313 U.S. 299, 85 Law Ed. 1368, decided in 1940 with Justices Douglas, Black and Murphy dissenting, was a criminal case involving willful alteration and false counting of ballots cast in the Louisiana Democratic Party Primary for the nomination of candidates for Congress. The Commissioners of Election were selected in accordance with the Louisiana law, which also *requires* political parties to nominate their candidates by direct *primary elections* which are *conducted by the State* at public expense under numerous statutory regulations, and the results of which are certified to the Secretary of State who is *prohibited from placing on the official ballot the name of any person not nominated in accordance with the Act.* Further, under the Louisiana law,

> "The *right to vote for a representative in congress at the general election is, as a matter of law, thus restricted* to the successful party candidate at the primary, to those not candidates in the primary who filed nomination papers, and those whose names may be lawfully written into the ballots by the electors.",

and that the name of an unsuccessful candidate at the primary election may not be written into the ballot or counted at the general election.

A demurrer was sustained to the indictment, but the Supreme Court reversed the lower court.

Here the election officials were *direct agents of the state acting "under color of law"* in a State conducted *mandatory* primary; the votes had been cast and were thereafter by the State, through its agents, altered and falsely counted and certified.

No such criminal action was involved in the present case.

The Jaybird Association balloting is not a *required* primary, is not conducted by the State at public expense through its own agents, the results are not certified to any official, does not constitute a step in the Two-Step election machine and has utterly no determination or control over the matter of candidates applying for position on the subsequent Official Primary Election ballot.

The split decision in the CLASSIC case has no bearing in the present cause.

SMITH v. ALLWRIGHT, 321 U.S. 649, 88 Law. Ed. 701, 151 A.L.R., 1110, was decided in 1944 and involved denial of a ballot to a negro in the Statutory Democratic Party Primary based on the 1932 resolution above quoted.

Again it was pointed out with reference to statutory provisions for Primary elections:

> "Under these chapters, the Democratic Party was *required* to hold a primary which was the occasion of the alleged wrong to the petitioner."

and that the holding in the HERNDON case (supra) was

> "* * * that *the action of Texas* in denying the ballot to negroes by statute was in violation of the equal protection clause of the Fourteenth Amendment * * *",

and that in the CONDON case (supra)

> "* * * the test was said to be whether the *committee operated as representative of the state* in the discharge of the state's authority."

Referring to its holding in GROVEY v. TOWNSEND, supra, this honorable Court stated that

> "* * * the *managers of the primary election were*, therefore, *declared not to be state officials in such sense that their action was state action.* A state convention of a party was said not to be an organ of the state. This Court went on to announce that *to deny a vote in a primary election was a mere refusal of party membership* in which the Court need have no concern * * * while for a *state* to deny a vote in an election on the ground of race or color, violated the Constitution."

The distinction between the GROVEY case and the CLASSIC case was further shown by pointing out that Section 4 of Article 1 of the CONSTITUTION authorized the Congress to regulate primary as well as general elections,

> "* * * Where the primary is by law made an integral part of the election machinery * * *";

that corruption was involved in the CLASSIC case and that:

> "This decision depended too on the determination that under the Louisiana Statute the primary was part of the procedure for choice of *Federal officials*",

and further,

> "* * * because the recognition of the place of the primary in the electoral scheme makes clear that *state delegation to a party* of the power to fix qualifications of primary election *is delegation of a state function* that makes the party's action the action of the state."

Again further holding that

> "*The question as to whether the exclusionary action of the party was the action of the state persists as the determinative factor*"

the Supreme Court, in the SMITH case involving a primary election for Federal as well as State Officers, held under mandatory provisions of the TEXAS STATUTE, decided and held

> "* * * *Texas requires* by the law the election of the county officers of a party * * * *Texas thus directs the election of all party officers*".
>
> "We think that this statutory system for the selection of party nominees for inclusion *on the general election ballot makes the party which is required* to follow these legislative directions an agency of the State insofar as it determines the participants in a primary election. The party takes its character as a *state agency* from the duties imposed upon it by State statutes * * *.
>
> "If the state *requires* a certain electoral procedure * * *, it endorses, adopts and enforces the discrimination against negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. *This is state action* within the meaning of the Fifteenth Amendment. * * *
>
> "The privilege of membership in a party may be, as the Court said in Grovey v. Townsend * * * no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary *to select nominees for a general election*, the state makes the action of the party the action of the state * * *."

The Jaybird Democratic Association is not *required* to hold a Primary Election, has never held any election to select nominees for a General Election, has never assumed or exercised any function constituting a part of the State Election machinery and none of the bases of the decision in SMITH V. ALLWRIGHT (supra) are applicable to it or to its straw votes.

RICE v. ELMORE (C.C.A. 4th), 165 F. 2d 387, cert. den., 333 U.S. 875, 92 L. Ed. 1151, and BROWN v. BASKIN (C.C.A.) 4th, 174 F. 2d 391, resulted from deliberate efforts to evade the SMITH v. ALLWRIGHT decision.

After SMITH v. ALLWRIGHT a special session of the Legislature of South Carolina was called for the *express purpose* of repealing the Primary Election laws so that the only election in the state would be the General Election.

The Primary was nevertheless in effect and in fact held, but the Negroes were denied the right to vote thereat on the theory that such Primary was not held under any statute and therefore the requisite item of State agency was not present.

This patent attempt to evade the SMITH v. ALLWRIGHT decision was struck down in RICE v. ELMORE (supra) because:

> "The use of the Democratic Primary in connection with the General Election in South Carolina provides, as has been stated, *a two step election machinery for that state;* and the denial to the Negro of the right to participate in the Primary denies to him all effective voice in the government of his country;"

and, referring to the Democratic Party,

> "The party may, indeed, have been a mere private aggregation of individuals in the early days of the Republic, but with the passage of the years, political parties have become in effect State institutions, governmental agencies through which sovereign power is exercised by the people. * * *
>
> "Elections in South Carolina remain a two-step process, whether the party Primary be accounted a preliminary of the General Election, or the General Election be regarded as giving effect to what is done in the

Primary; and those who *control the Democratic Party as well as the State government* cannot by placing the first of these steps under officials of the party rather than of the State, absolve such officials from the limitations which the Federal Constitution imposes. *When these officials* participate in what is a part of the State's election machinery *they are election officials of the State de facto if not de jure,* and as such must observe the limitations of the Constitution. Having undertaken to perform an important function relating to the exercise of sovereignty by the people, they may not violate the fundamental principles laid down by the Constitution for its exercise."

After RICE v. ELMORE (supra), "Democratic Clubs" took over the election machinery in South Carolina in a further effort to evade SMITH v. ALLWRIGHT (supra), but in BROWN v. BASKIN (supra) this further subterfuge was stricken down on the principle that the State had allowed the organization * * * "to take over and operate a vital part of its electoral machinery".

In South Carolina the Democratic Party had for many years controlled the State and its election machinery and had operated it as an agency of the State performing State functions in the Two-Step election process. The purposeful attempt to eliminate the first step was merely a surface change and the Two-Step electoral process remained, with the same organization in charge of both steps and the State itself.

PERRY v. CYPHERS (supra) has been discussed above and bears no similarity whatever to the present case. The Citizens Party there involved followed strictly the provisions of Article 3163, affirmatively made itself the agency of the State so far as concerned County and Precinct offices, and its Official Primary Election ballot was the only ballot on which appeared the names of candidates for County and Precinct offices to be voted upon as nominees for the Gen-

eral Election; the Democratic Party not including candidates for such local offices on its Primary ballot and not seeking to nominate such for the General Election.

There is no such arrangement between the Jaybird Association and the Democratic Party in Fort Bend County, Texas. The Democratic Party holds the Primary Election and is in no way concerned with the Jaybird Association, all of whose activities have ceased some two months earlier.

6-7.

(Controverting Petitioner's Argument Paragraph IV.)

The Constitutional and Statutory provisionss and the authorities cited above clearly demonstrate that the right to vote is in an election for public officers, which is conducted by the State or its delegated and controlled agencies exercising State functions. No right is granted nor guaranteed unto a person merely because he is white or black. No forced membership in any organization is guaranteed, nor is the right to participate in the activities of an organization other than those political parties which have accepted the office and responsibility of performing for the State functions which the State itself is obliged to perform.

Well in advance of every Official Primary Election, civic clubs, churches, teachers' associations, labor unions and innumerable other organizations of every type consider the qualifications of persons who contemplate running for office, or who might be persuaded to run if they are able to secure endorsement of their candidacy. Potential candidates for whom preference is expressed (for example in a poll by the C.I.O. of its numerous members) must then decide whether to become a candidate and must thereupon comply with the conditions prescribed by law to have their names placed on the Statutory Primary Election ballot, as must all other persons desiring to run.

It is undisputed that there is no compulsion for a Jaybird Association endorsee to apply for a position on the Official Democratic Primary Election ballot, but he must himself do so if it is to be done. It is also undisputed that persons refused the endorsement of the Association and even rejected from its straw vote ballot may and do secure places on the Democratic Party Primary ballot.

It is likewise undisputed that Jaybird Association members vote their own personal convictions at the Official Primary Election, and in fact have there nominated and subsequently elected persons rejected from the Jaybird Association ballot.

The Jaybird Democratic Association is no more than a group of people or private organizations which neither seeks nor accepts any grant of power or privilege from the State, neither intends nor attempts to come under or comply with, nor secure benefits and protection of, any statute or statutory procedure, but chooses its own membership and independently and without let or hinderance from the State secures from its membership an expression of opinion as to who would make honest and faithful County officials, and of a preference between qualified persons who independently and of their own volition might or might not thereafter comply with the legal requirements and secure a position on the Official ballot for a subsequent Statutory Democratic Party Primary Election by the people, and there compete for nomination with any and all other persons who might similarly obtain positions on the ballot.

The Jaybird Association, as can churches, labor unions and other organizations, can select those from whom it desires expressions of opinion on potential candidates; and, contrary to being required to permit such expressions from one and all, is itself protected by the First Amendment to the CONSTITUTION guaranteed Freedom of Assembly and Freedom of Speech.

Conclusion and Prayer

It is respectfully submitted that the Honorable Court of Appeals correctly analyzed the real facts in this cause, properly differentiated same from the authorities relied upon by Petitioners, and reached the conclusion compelled herein by accurate application of the true controlling basic principles.

WHEREFORE, Respondents respectfully pray that this Honorable Supreme Court of the United States in all things affirm the decision of the Honorable Court of Appeals.

Respectfully submitted,

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APPENDIX

Texas Revised Civil Statutes

"1. By Parties of One Hundred Thousand Votes and Over

"Article 3100. 3085 'Primary election'

"The term '*primary election*', as used in this chapter, means an election held by the members of an organized political party *for the purpose of nominating the candidates of such party to be voted for at a general or special election*, or to nominate the county executive officers of a party. Id."

"Article 3101. 3084 Nominated at primary

"On primary election day in 1946, and every two years thereafter, candidates for Governor and for all other State offices to be chosen by vote of the entire State, and candidates for Congress and all district offices to be chosen by the vote of any district comprising more than one county, to be nominated by each organized political party that cast two hundred thousand (200,000) votes or more at the last general election, shall, together with all candidates for offices to be filled by the voters of a county, or of a portion of a county, be nominated in primary elections by the qualified voters of such party. As amended Acts 1945, 49th Leg., p. 248, ch. 182, Sec. 2."

"Art. 3102. 3086 Date of primary

"The fourth Saturday in July 1926, and every two years thereafter shall be general primary election day, and *primary elections to nominate candidates for a general election*

shall be held on no other day, except when specially authorized. No person shall be declared the nominee of any political party at any primary election for any State or district office unless he has complied with every requirement of all laws applicable to primary and other elections, and has received a majority of all the votes cast at such primary elections for all candidates for such office. If at the general primary election for *any political party,* no candidate becomes the nominee for any State or district office under this article, a *second primary election* shall be held by such political party, in the State or such district or districts as the case may be, on the fourth Saturday in August succeeding such general primary election, and only the name of the two candidates who received the highest number of votes for any office for which nomination was made at the general election shall be placed on the official ballot as candidates for such office at such second primary. The second primary election shall be conducted according to the law prescribed for conducting the general primary election, and the candidates receiving a majority of all votes cast for the office to which they aspire shall be declared the nominee for their respective offices. *Any political party may hold a second primary election on the fourth Saturday in August to nominate candidates for any county or precinct office,* where a majority vote is required to make nomination; but at such second primary, only the two candidates who received the highest number of votes at the general primary for the same office shall have their names placed upon the official ballot. Nominations of candidates to be voted for at any special election shall be made at a primary election at such time as the party executive committee shall determine, but no such committee shall ever have the power to make such nominations. All precincts in the same county and all counties in the same district shall vote on the same day. Nomina-

tions of party candidates for office to be filled in a city or town shall be made not less than ten days prior to the city or town election at which they are to be chosen, in such manner as the party executive committee for such city or town shall direct, and all laws prescribing the method for conducting county primary elections shall apply to them. Id. Acts 4th C.S. 1918, p. 191."

"*Art. 3107. Political party may prescribe qualifications of members*

"Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party. Reenacted Acts 1927, 40th Leg., 1st C.S., p. 193, ch. 7, Sec. 1."

"*Art. 3113. 3101 Candidate for county office*

"*Any person desiring his name to appear on the official ballot for the general primary,* as a candidate for the nomination for any office to be filled by the qualified voters of a *county or a portion thereof* or for county chairman, shall file with the county chairman of the county of his residence, not later than Saturday before the third Monday in June preceding such primary, a written request for his name to be printed on such official ballot as a candidate for the nomination or position named therein, giving his occupation and post-office address, giving street and number of his resi-

dence, if within a city or town, such request to be signed and acknowledged by him before some officer authorized to take acknowledgment to deeds. Such request similarly signed and acknowledged by any twenty-five qualified voters resident in the county may be filed on or before said date, requesting that the name of any person named therein may be placed on the official ballot as a candidate for any county or precinct office or chairmanship, with like effect as if such request was filed by the person named as a candidate therein; which request shall be endorsed by the candidate named therein, showing his consent to such candidacy, if nominated. Id. Sec. 111."

"2. By Parties of 10,000 And Less Than 200,000 Votes

"Art. 3154. 3159 May nominate

"Each political party, whose nominee for Governor in the last preceding general election received as many as ten thousand (10,000) votes and less than two hundred thousand (200,000) votes, may nominate candidates for State, district and county offices under the provisions of this law by primary election, and they may nominate candidates for State offices and for United States Senator at a State convention, which shall be held the second Tuesday in August, and which shall be composed of delegates selected in the various counties and county conventions held on the first Saturday after primary election day, which shall be composed of delegates from the general election precincts in such counties elected therein at primary conventions, held in such precincts on the fourth Saturday in July. As amended Acts 1945, 49th Leg., p. 248, ch. 182, Sec. 3."

"3. NON-PARTISAN AND INDEPENDENT CANDIDATES

"*Art. 3159. 3164 Non-partisan and independent candidates*

"The name of a non-partisan or independent candidate may be printed on the official ballot in the column for independent candidates, after a written application signed by qualified voters addressed to the Secretary of State and delivered to him within thirty days after primary election day as follows: If for a State office to be voted for throughout the State, one per cent of the entire vote of the State cast at the last preceding general election; if for a congressional, supreme judicial, senatorial, representative, flotorial or judicial district office, three per cent of the entire vote cast in any such district at the last preceding general election; provided, that the number of signatures need not exceed five hundred for any congressional, senatorial or judicial office, nor for any other office that is not filled by all the voters of the State. No application to the Secretary of State shall contain the name of more than one candidate, and no citizen shall sign such application, unless he has paid his poll tax or received his certificate of exemption; provided, that, if the office is one to which two or more persons are to be elected, his application may be for as many candidates as there are persons to be elected to that office; and provided, also that no person who has voted at a primary election shall sign an application in favor of any one for an office for which a nomination was made at such primary election. Id. Secs. 94-95."

"4. BY PARTIES WITHOUT STATE ORGANIZATIONS

"*Art. 3163. 3169 Parties without State organization*

"*Any political party without a State organization desiring*

to nominate candidates for county and precinct offices only *may nominate such candidates therefor under the provisions of this title by primary elections or by a county convention held on the legal primary election day,* which convention shall be composed of delegates from various election precincts in said county, elected therein at primary conventions held in such precincts between the hours of eight a.m. and ten p.m. of the preceding Saturday. All nominations made by any such parties shall be certified to the county clerk by the chairman of the county committee of such party, and, after taking the same course as nominations of other parties so certified, shall be printed on the official ballot in a separate column, headed by the name of the party; provided, a written application for such printing shall have been made to the county judge, signed and sworn to by three per cent of the entire vote cast in such county at the last general election. Id. Sec. 100."